Civil No.
2nd Civil No. B 114226
LASC No. BC 008240

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SYED MOUZZAM ALI,

Plaintiff, Respondent and Cross-Appellant,

vs.

THE CITY OF LOS ANGELES,
A Municipal Corporation,

Defendant, Appellant and Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY HONORABLE LAWRENCE W. CRISPO, JUDGE

PETITION FOR REVIEW

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I

PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

The CITY OF LOS ANGELES, appellant below, respectfully petitions for review pursuant to Rule 28, California Rules of Court, following the published decision of the Court of Appeal, Second Appellate District, Division 4, filed December 28, 1999. (Appendix).

II

ISSUES PRESENTED FOR REVIEW

A landowner files a lawsuit challenging the denial of a permit as being in violation of state law. Judgment is entered against the landowner based on his failure to exhaust administrative remedies. Following this defeat, the landowner files an administrative appeal with the government agency, obtains the permit, and then files a new action for damages in inverse condemnation based on the earlier erroneous permit denial.

Is a landowner entitled to damages for a regulatory taking based on a non-final decision reversed by the government agency through its own development approval process?

May a landowner pursue damages for a regulatory taking without first succeeding in setting aside the government agency's decision through a judicial determination in a mandamus proceeding?

Can an action of a government agency that exceeds its statutory authority be a compensable taking?

III

THIS CAUSE IS APPROPRIATE FOR REVIEW

The issues presented by this petition are appropriate for review by this Court pursuant to Rule 29(a)(1), California Rules of Court. Review by this Court is necessary in order to secure uniformity of decision and to settle important questions of law. This case presents questions of significant importance to all levels of government within the State of California. This case presents important questions of law which have not been, but should be, settled by this Court.

Before the opinion of the Court of Appeal in this matter, a landowner could only base a claim in inverse condemnation on a final action of a government agency. (See *Williamson Planning Comm'n v. Hamilton Bank* (1985) 473 U.S. 172 ,87 L. Ed. 2d 126, 105 S. Ct. 3108; *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (hereafter *First English*); *Agins v. Tiburon* (1980) 447 U.S. 255, 65 L. Ed. 2d 106, 100 S. Ct. 2138; *Hensler v. City of Glendale* (1994) 8 Cal. 4th 1; and *Mola Development Corporation v. City of Seal Beach* (1997) 57 Cal.App. 4th 405.)

Despite the rule concerning "finality," the Court of Appeal decision, citing the opinion of this Court in *Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal. 4th 1006, held that the landowner in this case could obtain damages in inverse condemnation based on a decision that

was reversed after the landowner exhausted his administrative remedies. The Court of Appeal has opened the door for plaintiffs to seek damages whenever there is any error by a government agency during its own development approval process.

Government agencies should not be compelled to defend litigation based on decisions which the agencies themselves reverse during the course of their own development approval processes. The Court of Appeal's ruling will expose cities, counties, the state and other state public bodies to inverse condemnation claims brought by landowners who have neither obtained final administrative decisions on their entitlement requests, nor exhausted available administrative or judicial remedies. Initial or preliminary erroneous government actions would therefore be the subject of lawsuits seeking damages in inverse condemnation, even if these decisions are not final and have not been otherwise invalidated by the courts.

It is important that the Supreme Court issue a ruling regarding the ability of landowners to seek compensation based on erroneous decisions that are corrected by government agencies through their own development approval processes.

IV

STATEMENT OF FACTS

On November 17, 1988, the Ferraro Hotel was the scene of a major alarm fire, which resulted in substantial

property damage and rendered the structure uninhabitable. (JA[1], XIV, p. 3741, ¶ 5.) Inspectors from the Department of Building and Safety conducted an inspection of the property the same day (RT[2], 523:20-525:20) to determine whether the premises were safe for entry or occupancy. (RT, 526:1-6.) After the inspection, Orders to Comply were posted on the property ordering, *inter alia*, that the building be vacated and the premises secured. (JE[3]2 and 3.) The inspection determined that the hotel was approximately 35 per cent fire damaged, mostly to the top floor and roof. (JE, 4-1; RT, 543:9-544:11.)

On December 16, 1988, Ali entered into an agreement with Fred Harouni to sell the Ferraro Hotel[4]. (JE 135.) The sales agreement was handwritten by Fred Harouni and required, *inter alia*, that the property "be demolished to original level." (RT, 254:4-9.) Fred Harouni believed that the contract required Ali to obtain a demolition permit and that Harouni would have the building demolished. (RT, 255:8-18.)

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[1] Joint Appendix In Lieu of Clerk's Transcript, followed by the Roman Numeral of the volume and then the page or pages. Volumes I through X contain the Administrative Record and the trial proceedings up to the first appeal, B 077712. Volumes XI through XIV constitute the proceedings following the remittitur filed September 22, 1995.

[2] Reporter's Transcript on Appeal, followed by the page number and the line or lines.

[3] Joint Exhibit. The parties stipulated to the admission of numerous exhibits at trial. JE followed by the exhibit number conforms to the numbering sequence used at trial.

[4] Fred Harouni assigned his interest in the property to the Alvarado 6 Partnership, remaining a principal in the partnership. (RT, 248:11-17 and 259:3-4.)

On January 19, 1989, Ali applied for a demolition permit. (JE 55-5; RT, 84:17-28.) Based upon information provided by Ali, the supervising engineer of the Structural Plan Check Division believed that the Ferraro Hotel was a single room occupancy (SRO) hotel and was subject to a moratorium on the demolition of such buildings. (JA, XIII, p. 3626, ¶¶ 2-6.) Based upon this information, he advised the plan checker assigned to the application, that the Ferraro may be an SRO hotel. (Edwards Deposition, 15:2-24.) Because there was insufficient information to determine whether this was or was not a SRO hotel, the plan checker wrote corrections requiring compliance with the SRO ordinance. (*Id.* at 19:6-14; 44:18-25; 47:23-48:3.) Ali did not file an administrative appeal.

The SRO Ordinance

In order to preserve the stock of low cost housing, the City adopted Ordinance No. 164 175 (JE 122), which placed a moratorium on demolition permits for SRO hotels.

The ordinance provided that the City Council could grant a hardship exemption from the provisions of the ordinance "in cases of extreme hardship duly established to the satisfaction of the City Council." (JE 122-3.) Applications for a hardship exemption were to be filed with the Rent Stabilization Division of the Community Development Department. (*Id.*) Appeals or requests were handled administratively, investigated, and heard before an independently retained professional hearing officer who would render a written decision. (JA, XIII, p. 3702, ¶ 4; RT, 397:26-399:7.)

During 1989, Division staff and its director spent considerable time with Ali explaining the hardship exemption process, and the director mailed him an application (RT, 405:27-405:19; JA, XIII, p. 3703, ¶ 6), which he did not file. (RT, 405:20-21; JA, XIII, p. 3703, ¶ 6.) At no time during these conversations did Ali state or imply that the Ferraro was not a SRO hotel. (RT, 406:2-5; JA, XIII, p. 3703, ¶ 6.)

On August 10, 1989, the Department issued an Order to Comply at the Ferraro Hotel, (JE 18), stating that because the hotel was repeatedly fire damaged, Ali was required to secure the building and all accessible openings from entry. The order also required Ali to obtain the services of a licensed private security guard company to maintain a 24-hour security watch on the property.

When Ali did not comply with that order, pursuant to authorization by the Council, City personnel entered the property to secure the building and commence a fire watch utilizing a private security service. City personnel gave Ali's attorney the appeal forms necessary to challenge all aspects of the City's action, including the placement of security guards on the property. (RT, 460:8-28; 492:13-493:12, 460:27-461:13.) No administrative appeal was filed. (RT, 489:18-25.)

Litigation in *Ali I*

Instead of exhausting available administrative remedies, Ali filed a petition for a writ of mandate in Superior Court on September 6, 1989, *Ali v. City of Los*

Angeles (C736585) [hereafter *Ali I*][5], alleging that he had applied for a demolition permit for the Ferraro Hotel, (First Amended Complaint in *Ali I*, page 2:28 to 3:1-2) that it "is not an S.R.O. Hotel" within the definition of the SRO Ordinance; (First Amended Complaint in *Ali I*, p. 7:9-14), and that the SRO Ordinance violated the Ellis Act, Govt. Code '7060, et seq. (First Amended Complaint in *Ali I*, p. 4:16-19.).

In its demurrer, the City established that Ali had received a list of corrections required by the Department of Building and Safety prior to issuing a demolition permit for the Ferraro Hotel, including compliance with the SRO Ordinance. However, the City pointed out that any determination by the Department can be appealed; and that this right of appeal would include whether a building is or is not a SRO hotel subject to the provisions of the SRO Ordinance. The City also urged that the First Amended Complaint was subject to demurrer because Ali failed to exhaust available administrative remedies. (Memorandum of Points and Authorities In Support of Demurrer and Request For Judicial Notice [Demurrer]), pp. 7:25 to 8:18 and 5:18 to 6:17).

Further, the City noted that Ali claimed that the SRO Ordinance as it is being applied by the Department in this instance was unconstitutional because the SRO ordinance in the words of the First Amended Complaint attempts to

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[5] Copies of the complaint and the City's successful demurrer in that case are attached hereto as Appendix A and Appendix B, respectively, to the Petition for Rehearing in this case.

circumvent and preempt a legitimate state interest, of the Ellis Act. (First Amended Compliant, p. 7:9-14).

The City disputed this legal contention. The City argued that the Ellis Act did not prohibit a municipality from enacting an ordinance regulating the issuance of demolition permits. Rather, the Ellis Act only prohibits a public entity from compelling the owner of residential real property to offer the property for rent or lease; and because the SRO ordinance did not compel Ali to offer his property for rent or lease, the SRO ordinance as applied to Ali did not run contrary to the Ellis Act. (Demurrer, p. 12:1-17)

In *Ali I*, the trial judge, Judge Zebrowski accepted the City's legal arguments. The judgment in *Ali I* held that the City had the legal right to require exhaustion of administrative remedies as part of the development approval process in this instance. (JE 187) Ali did not appeal this judgment.

Ali Finally Pursues His Administrative Remedies

After losing *Ali I*, Ali retained a new attorney, and finally pursued his administrative remedies by filing an appeal with the Department of Building and Safety. (JE 184.) Hearings were held on May 31, 1990, before the Department's Advisory Appeals Board, and on June 12, 1990, before the Board of Building and Safety Commissioners. (JA, XIV, p. 3745, ¶¶ 36 and 37.)

During these hearings, Ali for the first time provided information indicating the Ferraro was not a SRO Hotel (RT, 407:15-21). A permit was issued on August 8, 1990,

(JA, XIV, p. 3745, ¶ 41) and demolition of the Ferraro Hotel started the next day. (JA. XIV, p. 3756, ¶ 42.)

V

PROCEDURAL HISTORY OF THE PRESENT CASE

Ali commenced this lawsuit seeking a Petition for Writ of Administrative Mandate to reverse the City's determination to impose lien assessments for the costs of the fire watch at the Ferraro Hotel, and damages for deprivation of civil rights, interference with contract, and trespass. (JA, I, pp. 17-40.)

Proceedings in *Ali II* Relating to the Assessment Liens

Ali applied for a writ of mandate to require the City to set aside its lien for the cost of the fire watch. (JA, X, pp. 2796-2801.) In an unpublished opinion filed on May 9, 1995, the Court of Appeal reversed the trial court's denial of the writ with respect to the lien assessment issues and remanded the case for further proceedings (JA, XI, 2884-2895). After remittitur, Judge O'Brien granted the writ.

Proceedings in *Ali II* Relating to the Inverse Condemnation Cause of Action

A court trial on the "takings" issues was held before Superior Court Judge Lawrence Crispo (JA, XIV, p. 3748.) The court ruled that the City's action placing a fire watch at the Ferraro Hotel constituted a physical taking. (JA, XIV, p. 3830.) It also ruled that the initial denial of the

demolition permit for the Ferraro Hotel constituted a regulatory taking. (JA, XIV, p. 3829.)

It was undisputed by the parties that there was a delay in the issuance of a demolition permit between January 1989 and August 1990. Judge Crispo found as an historical fact that this delay was due to a misclassification of the property as a SRO hotel. In ruling on the regulatory taking claim, Judge Crispo made no mention of the Ellis Act. Ruling on Ali's cause of action for inverse condemnation, Judge Crispo found that: "The City's initial designation of the Ferraro as an SRO was erroneous. The SRO ordinance prevented the immediate demolition of the Ferraro. . . . " (JA, XIV, p. 3829.)

Judge Crispo also made the following findings about the character of the City's actions:

> "[T]he City's actions were not oppressive nor do they shock the conscience. While the actions of the City's employees were negligently performed, there is no credible evidence that they deliberately sought to deprive Mr. Ali of his due process rights. On the contrary, the court finds that they acted in good faith. Finally, the City's action, though misguided, was an attempt to further legitimate interests in protecting both its zoning integrity and the public." (JA, XIV, p. 3896.)

The trial court awarded damages for the taking in the amount of $1,179,821.00. (JA, XIV, p. 3897.) Both the City and Ali appealed.

The Court of Appeal Decision

The appeal was heard by Division Four of the Second Appellate District. On December 28, 1999, the Court issued an opinion upholding the Superior Court's determination that there had been a regulatory taking, stating: "We conclude that the judgment in favor of Ali in inverse condemnation should be affirmed on the ground that the City's wrongful denial of a demolition permit between January 1989 and August 1990 in violation of the Ellis Act effected a temporary regulatory taking of Ali's property." (Appendix, p. 4.)

VI

ARGUMENT

A. A Regulatory Taking Claim Cannot Be Based on a Non-final Decision Reversed by the Government Agency Through its Own Development Approval Process.

In *Ali I*, the Superior Court found that Ali had failed to exhaust his administrative remedies and that his challenge to the City's initial denial of a demolition permit was not ripe for judicial review.

As this Court recognized in *Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal. 4th 1006, 1018 (hereafter *Landgate*), a landowner may only seek just compensation with respect to a final action of a government agency:

> "[T]he [United States] Supreme Court has emphasized that the question whether property has been taken is not ripe for decision until a

> government agency has rendered a final decision on the use to which the property in question may be put. Our reluctance to examine taking claims until . . . a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although the question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty [citation], this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. [Citations.] Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question. (*Williamson Planning Comm'n v. Hamilton Bank (1985) 473 U.S. 172, 190-191 [105 S. Ct. 3108, 3118-3119, 87 L. Ed. 2d 126]*; see also *MacDonald, Sommer & Frates v. Yolo County (1986) 477 U.S. 340, 348 [106 S. Ct. 2561, 2565-2566, 91 L. Ed. 2d 285].)*" (interior quotation marks omitted)

The constitutional principles set forth above make it clear that the City's initial permit denial was not a decision that could be made the basis of a takings claim. It was not a final action of the City. Ali obtained a demolition permit after he finally exhausted his administrative remedies.[6] This fact alone indicates that the earlier permit

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[6] The writ of administrative mandate in this case evolves from the assessment hearings for the cost of security at the

denial was not a final action of the City, and therefore cannot be the basis for a claim for damages based on a regulatory taking.

B. *Landgate* Does Not Eliminate the Procedural Prerequisites to An Action In Inverse Condemnation Described in *Hensler*.

In *Hensler v. City of Glendale* (1994) 8 Cal.4th 1 (hereafter *Hensler*), this Court held that before resorting to the courts for just compensation for a regulatory taking, a landowner must first exhaust all available administrative remedies, including obtaining a judicial determination that the government action is invalid. As stated in *Hensler, supra* at pp. 13-14:

> "If the alleged taking is a 'regulatory taking,' i.e., one that results from the application of zoning laws or regulations which limit development of real property, however, the owner must afford the state the opportunity to rescind the ordinance or regulation or to exempt the property from the allegedly invalid development restriction once it has been judicially determined that the proposed application of the ordinance to the property will constitute a compensable taking. . . . The owner 'may not, however, elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid.' (*Agins v. City of Tiburon, supra,* 24 *Cal.3d* 266,

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Ferraro, not from the issues asserted in the inverse condemnation cause of action.

> 273.) Compensation must be paid for a permanent taking only if there has been a final judicial determination that application of the ordinance or regulation to the property is statutorily permissible and constitutes a compensable taking."

It is clear that Ali has not satisfied the basic preconditions to an action in inverse condemnation described in *Hensler*. By failing to appeal the adverse judgment in *Ali I*, the correctness of the original permit denial cannot be the subject of damages for a regulatory taking. *See Mola Development Corporation v. City of Seal Beach* (1997) 57 Cal.App. 4th 405.

Ali's failure to appeal the adverse judgment in *Ali I* is fatal to his claim for damages for inverse condemnation. In the words of this Court:

> "A California landowner, who believes that application of a state statute or local ordinance limiting development of the owner's property works a taking, may not bypass the remedies the state has made available to avoid the taking. If he does so, the state may deem the owner to have waived the "taking" claim. (*County of Imperial v. McDougal (1977) 19 Cal.3d 505, 510-511. . . .* " (*Hensler,* supra 8 Cal.4th 1, 19)

Nevertheless, the Court of Appeal decision excuses Ali's failure to comply with *Hensler* by suggesting that these preconditions do not apply when the landowner is attacking the government agency's authority to act. The Court of Appeal stated:

> "It is the City's position that timely exhaustion of administrative remedies is a necessary part of the normal development process, citing *Hensler v. City of Glendale (1994) 8 Cal. 4th 1, 876 P.2d*

> *1043.* This argument does not apply to the circumstances of this case. . . . [A]dministrative review of the determination whether the Ferraro was an SRO hotel is irrelevant. Whether or not the Ferraro was an SRO hotel, Ali was entitled under the Ellis Act to demolish it and go out of the SRO hotel business. . . . We are not reviewing the classification of the Ferraro as an SRO hotel, but rather the City's legally erroneous invocation of its SRO ordinance against Ali in violation of the Ellis Act. The City may not simply delay development by fabricating an irrelevant dispute about whether the Ferraro was an SRO hotel. (*Landgate, supra, 17 Cal. 4th at p. 1029.)*" (Appendix, pp. 13-15)

To the contrary, a landowner who believes that the action of the government agency is in excess of its jurisdiction is the very landowner who must afford the governmental agency the opportunity to change course.

The Court of Appeal has misinterpreted *Landgate*. The owner in *Landgate* wanted to build a large home in Malibu. The County of Los Angeles had given the owner's predecessor in interest a lot line adjustment some years before *Landgate* acquired the property. In October 1990, the owner sought a permit from the Coastal Commission to construct a large home which the Commission ultimately denied in February 1991. One ground for the denial was that, because the lot line adjustment had not been approved by the Commission, it was invalid. In March 1991, the owner sought a writ of mandate asserting that the Commission had no jurisdiction over the lot line adjustment. The action included a complaint for inverse condemnation. The writ petition was granted by the trial court in October 1991, and the Court

of Appeal affirmed in December 1992. Those courts concluded that the Commission's determination concerning the lot line adjustment was erroneous as a matter of state law. On remand, the Commission approved Landgate's project in February 1993. The owner then moved for summary judgment on the takings claim, asserting that the lot line adjustment dispute prevented it from making any economical viable use of the property from February 1991 to February 1993. The trial court granted Landgate's motion, agreeing that all economically viable use of the property was temporarily denied because building permits could not be obtained. The Court of Appeal affirmed.

This Court reversed, concluding that the delay was a normal part of the regulatory process. In reaching this conclusion, this Court stated:

> "The present case poses the issue of whether a legally erroneous decision of a government agency during the development approval process resulting in delay constitutes a temporary taking of property. Virtually every court that has examined the issue has concluded, for various reasons and under various theories, that a regulatory mistake resulting in delay does not, by itself, amount to a taking of property." (17 Cal.4th 1018)

This Court then expanded on this theme, saying:

> "We substantially agree . . . that an error by a governmental agency in the development approval process does not necessarily amount to a taking even if the error in some way diminishes the value of the subject property, any more than the commission of state law error during a

> criminal trial is an automatic violation of the due process clause. . . . But government land use regulations and decisions . . . , which, despite their ultimately determined statutory defects, are part of a reasonable regulatory process designed to advance legitimate government interests, are not takings of property. . . . " (17th Cal.4th at 1020-1021)

As was the case in *Landgate*, the City's original denial of the demolition permit was part of a "reasonable regulatory process designed to advance legitimate government interests" and therefore it was not a taking.

Landgate and *Hensler* must be read together. *Hensler* requires the landowner first to obtain a final government decision. Second, the landowner must obtain a judicial determination that the decision is in error. Finally, the landowner must afford the government agency the opportunity to change its final decision.

Landgate logically follows from *Hensler*. It addresses questions of proof that may arise in a properly prosecuted action in inverse condemnation. *Landgate* makes clear that the landowner must prove more than that the public agency committed error during decisionmaking is part of the normal development approval process.

C. The City's Permit Denial Was Not So Unreasonable to Lead to the Conclusion That It Was Taken Only for Delay.

This Court in *Landgate* recognized that there are circumstances in which the time needed to judicially resolve an alleged government error will not be recognized as part of the normal development process. That is so when

the government's action is "so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development process." *Landgate, supra* at p. 1024. The Court of Appeal determined that the City should have known that its ordinance violated the Ellis Act and that its denial of the demolition permit met that standard of unreasonableness. Its determination in that regard totally ignores the trial court's finding of fact that, although the City's actions "were negligently performed, there is no credible evidence that they deliberately sought to deprive Mr. Ali of his due process rights. To the contrary, the trial court finds that [the City] acted in good faith." (JA, XIV, p. 3896.) The Court of Appeal came to its conclusion, at least in part, based on its assumption that the City never challenged the contention that its actions violated the Ellis Act. Of course, there is no basis for that conclusion. The City's compliance with the Ellis Act was addressed by the City in its demurrer in *Ali I.* (See Statement of Facts above.)

D. An Action of a Government Agency That Exceeds its Statutory Authority Is Not a Compensable Taking.

The core finding of the Court of Appeal is that the City's original action exceeded its authority under state law.

However, takings liability can only be founded upon government action that is within the statutory authority of the government agency. If the aggrieved landowner contends that the action of the government agency is in

excess of that agency's statutory authority, then the landowner must raise such a claim in the form of a due process claim. The takings clause cannot be used to evaluate claims that governmental action constitutes an unauthorized exercise of authority. See *Eastern Enterprises v. Apfel* (1998) 524 U.S. 498, 96 L.Ed. 2d 451, 118 S.Ct. 2131.

E. State Law Preemption Disputes Are a Normal Part of the Development Approval Process.

The Court of Appeal decision holds that the delay in demolition caused by the erroneous enforcement of the SRO ordinance was not a "normal" delay in the development process, because in its view such enforcement efforts were in conflict with the prohibitions of the Ellis Act. This conclusion was wrong.

At issue here is the City's requirement that Ali comply with the City's SRO ordinance in 1989. In August 1990, Ali obtained his demolition permit after it was finally determined that the Ferraro Hotel was not a SRO hotel. The City successfully defended the SRO ordinance against charges that it violated the Ellis Act in *Ali I*. The City argued that the Ellis Act did not prohibit a municipality from enacting an ordinance regulating the issuance of demolition permits. Rather, the Ellis Act only prohibits a public entity from compelling the owner of residential real property to offer the property for rent or lease; and because the SRO ordinance did not compel Ali to offer his property for rent or lease, the SRO ordinance as applied to Ali did not run contrary to the Ellis Act. (Demurrer, p. 12:1-17.)

Even assuming that the City's enforcement efforts were preempted by state law, in *Del Oro Hills v. City of Oceanside* (1995) 31Cal.App.4th 1060, the Court of Appeal held that violation of state law, without more, does not result in a taking. There, plaintiff sought, *inter alia*, damages because an invalid residential growth control initiative caused it to lose money on the sale of real property. The Court rejected plaintiff's efforts, noting that the invalidity of the statute did not convert it into an unconstitutional taking of property. An invalid regulation is not necessarily an unconstitutional one. *Id.* at 1080.

The United States Constitution does not call for the payment of just compensation just because a public agency makes a mistake in the development approval process. *First Lutheran Church v. Los Angeles County (1987) 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 2378.* Takings cases recognize that there is no liability for delays which may occur while a determination on an application is being reached. (See *Landgate, Inc. v. California Coastal Com. (1998) 17 Cal. 4th 1006, 1030; Guinnane v. City and County of San Francisco (1987) 197 Cal. App. 3d 862, 865, 869-870.)* Liability for delay in processing a development proposal may only be imposed when it goes "beyond that to be expected as part of the normal permit process." (*Hensler, supra* at p. 15.) The process includes the period in which a government agency deals with "threshold questions that must be resolved before it can be determined whether a development should be permitted to proceed." (*Landgate, supra,* at p. 1030.)

This Court has recognized that resolution of such threshold questions "often turns on the construction and application of complex statutory schemes and results in

significant delays in the development process." (*Id.*) Notwithstanding the lengthy interval which may pass while such issues are resolved, the interval is not compensable because " 'the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking' [Citation.]" (*Id. at p. 1027.)*

State law preemption questions are threshold questions which must often be resolved in the development approval process. For example, see *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725; *Griffin Dev. Co. v. City of Oxnard* (1985) 39 Cal.3d 256; *The Pines v. City of Santa Monica* (1981) 29 Cal.3d 656) Because the City's possible misconstruction of its authority in light of the Ellis Act arose in the context of the normal permit process, it was not a taking of property for which just compensation must be paid.

F. The City Has A Legitimate Interest In The Enforcement of the SRO Ordinance.

Contrary to the Court of Appeal decision, the City's interest in the supply of low income housing is a legitimate government interest.

The maintenance of an adequate housing supply is a substantial and legitimate governmental interest. *Griffin Development Co. v. City of Oxnard* (1985) 39 Cal.3d 256, 264: *Nash v City of Santa Monica* (1984) 37 Cal.3d 97, 109. Housing availability is of vital statewide importance, and local governments have the responsibility to make adequate provisions for the housing needs of all economic segments of the community. Govt. Code § 65580, subd. (a)

and (d); see also Govt. Code § 65913 [Legislative declaration that there exists a severe shortage of affordable housing]. The City's actions in this matter were objectively keyed to a legitimate state interest. Under these circumstances, the initial SRO determination, although subsequently determined to be in error, substantially advanced some legitimate state interest.

The City's ordinance (Ordinance No. 164175, JE 122) regulating the demolition of SRO hotels served a legitimate state interest: the preservation of low income housing. The maintenance of an adequate housing supply is a substantial and legitimate governmental interest. *Griffin Development Co. v. City of Oxnard* (1985) 39 Cal.3d 256, 264; *Nash v. City of Santa Monica* (1984) 37 Cal.3d 97, 109. Ali, like the plaintiff in *Del Oro*, has failed to meet his burden to show that the ordinance, although invalid under state law[7], , promoted no legitimate state interest.

Further, there is no showing that Ali was denied all economically viable use of his property. It is well-settled that where, as here, compensation is claimed because of diminished property values, the inquiry focuses on the uses of the property which remain. *Guinnane, supra,* 197 Cal.App.3d at 868. Interim valuation fluctuations during the government decision making process do not result in a taking. *Id.* at 869. Even a substantial diminution in

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[7] In the prior decision, B 077712, the Court of Appeal held that the application of Ordinance No. 164175 to the Ferraro Hotel was in conflict with the Ellis Act, Government Code section 7060.7, subdivision (1).

value does not constitute a taking. See, *Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1036 and the cases cited therein.

Although there was a delay in the sale of his property to Harouni, Ali did sell to the original purchaser. The final sales price was $2,350,000.00 (RT, 69:8-20). Ali was not denied the economic use of his property, and there was a significant public interest in the SRO ordinance. Therefore, the Court of Appeal's determination of a regulatory taking is clearly erroneous and must be set aside by this court.

CONCLUSION

The issues raised by this petition are of vital importance to public agencies and landowners throughout the State. As such the City respectfully asks that the Court grant review of this matter.

Dated: February 4, 2000

Respectfully submitted,

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